

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**KATICA SUDAC, for herself and her  
minor child, MARINA SUDAC,**

**Plaintiffs,**

**vs.**

**CIVIL ACTION  
No. 03-2520-GTV**

**TRUNG HOANG, individually and  
in his official capacity, RON MILLER,  
individually and in his official capacity,  
and THE UNIFIED GOVERNMENT  
OF WYANDOTTE COUNTY, KANSAS,**

**Defendants.**

**MEMORANDUM AND ORDER**

Plaintiff Katica Sudac brings this action on behalf of herself and her minor daughter, Marina Sudac (“Plaintiffs”), against Defendants Trung Hoang, Ron Miller, and the Unified Government of Wyandotte County, Kansas (“Defendants”). Plaintiffs’ complaint alleges five claims pursuant to: (1) the Civil Rights Act of 1871, 42 U.S.C. § 1983; (2) the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq., and the Rehabilitation Act of 1973 (“Rehabilitation Act”), 29 U.S.C. § 794; (3) the Kansas Act Against Discrimination (“KAAD”), K.S.A. § 44-1001 et seq.; (4) the Care and Treatment Act for Mentally Ill Persons, K.S.A. § 59-2945 et seq.; and (5) the Kansas Wrongful Death Act, K.S.A. § 60-1901 et seq. Plaintiffs contend

that Defendant Trung Hoang, a police officer, unlawfully shot and killed Tomislav Pevac, their son and brother, respectively. Plaintiffs seek compensatory and punitive damages, as well as injunctive relief.

This action is before the court on Defendants' motion to dismiss (Doc. 5) Counts I, II, III, and IV of Plaintiffs' complaint. Defendants do not seek dismissal of Count V, Plaintiffs' state wrongful death claim. For the following reasons, Defendants' motion is granted in part and denied in part.

### **I. Standard of Review**

A rule 12(b)(6) motion to dismiss will be granted only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling her to relief under her theory of recovery. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984) (citation omitted). The court must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed. Id. (citation omitted). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support her claims. Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

### **II. Factual Background**

Tomislav Pevac ("Tomi") lived with his mother and sister in Kansas City, Kansas. Tomi, an eighteen-year old student, suffered from severe depression. Plaintiffs allege that this medically

diagnosed mental disability caused Tomi to “exhibit violence, outrage and strong suicidal tendencies” when he did not take his prescribed medications.

On September 20, 2001, Plaintiffs state that they experienced difficulty in controlling Tomi because he was not taking his medications. As a result, they called 911 and requested assistance from the police. Plaintiffs allege that when Defendant Hoang and other officers arrived at their residence, they did not call for qualified assistance. Instead, they allege that the officers chased Tomi and that Defendant Hoang fatally shot Tomi with his handgun.<sup>1</sup>

#### **IV. Discussion**

##### **1. § 1983 Claim**

Count IV of Plaintiffs’ complaint alleges that Defendants violated the Fourth and Fourteenth Amendments of the United States Constitution pursuant to 42 U.S.C. § 1983. Specifically, Plaintiffs claim that Defendant Hoang made an unreasonable seizure of Tomi’s person and used excessive force against him, that Defendants Miller and the Unified Government of Wyandotte County, Kansas (“Unified Government”) developed customs and policies contrary to the rights of Tomi and mentally disabled persons in Kansas City, Kansas, and that all Defendants were deliberately indifferent to Tomi’s rights.

Defendants maintain that Plaintiffs lack standing to bring their § 1983 claims because: the proper remedy in § 1983 death cases is a survival action brought by the decedent’s estate; and Plaintiffs allege only violations of Tomi’s constitutional rights, they do not claim violations of

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<sup>1</sup> Defendants’ brief maintains that Officer Hoang acted in self-defense when Tomi “lunged” at him with a knife.

their own personal rights.

It is well established that “a section 1983 claim must be based upon the violation of [the] plaintiff’s rights, and not the rights of someone else.” Archuleta v. McShan, 897 F.2d 495, 497 (10th Cir. 1990) (citing Dohaish v. Tooley, 670 F.2d 934, 936 (10th Cir. 1982)); see Dohaish, 670 F.2d at 936 (“The § 1983 civil rights action is a personal suit. It does not accrue to a relative, even the father of the deceased.”). In Berry v. Muskogee, the Tenth Circuit held that the proper federal remedy in § 1983 death cases is “a survival action, brought by the estate of the deceased victim, in accord with § 1983’s express statement that the liability is ‘to the party injured.’” 900 F.2d 1489, 1506-07 (10th Cir. 1990) (citation omitted).<sup>2</sup> In addition to punitive damages, the Berry court held that a decedent’s estate may recover “appropriate compensatory damages,” including “medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim’s life had not the injury occurred, the victim’s loss of consortium, and other damages recognized in common law tort actions.” Id. at 1507.

As Defendants correctly point out, Plaintiffs’ complaint does not allege a proper § 1983 claim. First, Plaintiffs base their § 1983 claims on the violation of Tomi’s constitutional rights.

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<sup>2</sup> Several courts in this district, including this court, have previously applied the holding in Berry. See Naumoff v. Old, 167 F. Supp. 2d 1250 (D. Kan. 2001); Estate of Fuentes v. Thomas, 107 F. Supp. 2d 1288 (D. Kan. 2000); Yeoman v. City of Parsons, No. 95-2272-GTV, 1997 WL 159048 (Mar. 21, 1997); Wilson v. Meeks, No. 91-1504-PFK, 1994 WL 324575 (D. Kan. June 6, 1994), rev’d on other grounds, 52 F.3d 1547 (10th Cir. 1995); Uhlig v. Harder, 853 F. Supp. 1239 (D. Kan. 1994); Carl v. City of Overland Park, Kan., No. 93-2202-JWL, 1994 WL 171736 (D. Kan. Feb. 4, 1994); Tomme v. City of Topeka, No. 89-2033-V, 1992 WL 81334 (D. Kan. Mar. 4, 1992); Scothorn v. Kansas, 772 F. Supp. 556 (D. Kan. 1991); Coleman v. Craig, No. 88-1401-C, 1991 WL 42291 (Mar. 11, 1991), aff’d, 951 F.2d 1258 (10th Cir. 1991).

They state that Defendants made an unreasonable seizure of Tomi's person, applied excessive force against Tomi, displayed deliberate indifference towards Tomi's rights, and developed customs and policies contrary to Tomi's rights and the rights of mentally disabled persons and their families in Kansas City, Kansas. Plaintiffs' complaint fails to allege violations of constitutional rights personal to Plaintiffs.

Plaintiffs also concede that no estate has been opened on behalf of Tomi. Plaintiffs, however, assert that under Kansas law, "any one of the heirs at law of the deceased" may bring suit to recover losses suffered as a result of the alleged wrongful death. See K.S.A. § 60-1902.

This argument is contrary to Berry's holding that the personal representative of the estate of the deceased is the appropriate party to bring suit. Moreover, this argument has been expressly rejected by this court in a prior decision. See Tomme, 1992 WL 81334, at \*3 (stating that "an heir at law may not bring a wrongful death action under section 1983 for the alleged infringement of the decedent's constitutional rights").

Finally, Plaintiffs style their claim as a wrongful death action, which is not recognized as a federal remedy under § 1983 in the Tenth Circuit. See Berry, 900 F.2d at 1511 (Tacha, J., concurring) (concluding that the plaintiff could not "make out a federal wrongful death claim under section 1983"); Coleman, 1991 WL 42291, at \*3 (observing that the majority in Berry "tacitly admit[ted] that heirs cannot bring a federal wrongful death claim under § 1983 to recover for their loss of rights created and recognized only under state law"). Under Count IV of their complaint, Plaintiffs request damages against Defendants "for the *wrongful death of Tomi* and for *their loss* of his income, services, protection, care, assistance, society, companionship, comfort, guidance,

counsel and advice, and for funeral and burial expenses” (emphasis added).<sup>3</sup> Except for burial expenses, Plaintiffs do not seek to recover the damages enumerated in Berry. Instead, they seek compensation due to the loss of their relationship with Tomi. These wrongful death damages not recoverable in a section 1983 claim. See Scothorn, 772 F. Supp. at 562 (“Plaintiffs have pleaded their section 1983 claim as a wrongful death claim. They are only seeking recovery for wrongful death damages for their grief, bereavement and mental suffering. These are not items of damages properly compensable under section 1983.”).

Plaintiffs ask the court not to dismiss their § 1983 claim on the basis of standing. Pursuant to Fed. R. Civ. P. 17, they request that the court allow them a reasonable time to open an estate and to secure a representative as the real party in interest.<sup>4</sup> The court will construe Plaintiffs’ request as a motion for leave to amend their complaint.

Fed. R. Civ. P. 15(a) provides that “leave [to amend] shall be freely given when justice so requires.” Leave to amend is a matter committed to the court’s sound discretion and is not to be

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<sup>3</sup> The court notes that this is the same list of damages Plaintiffs request for their state wrongful death claim in Count V. In Kansas, wrongful death damages may be sought for:

- (1) Mental anguish, suffering or bereavement;
- (2) loss of society, companionship, comfort or protection;
- (3) loss of marital care, attention, advice or counsel;
- (4) loss of filial care or attention;
- (5) loss of parental care, training, guidance or education; and
- (6) reasonable funeral expenses for the deceased.

K.S.A. § 60-1904(a).

<sup>4</sup> Rule 17(a) of the Federal Rules of Civil Procedure provides that “[e]very action shall be prosecuted in the name of the real party in interest.”

denied without the court giving some reason or cause on the record. Fed. Ins. Co. v. Gates Learjet Corp., 823 F.2d 383, 387 (10th Cir. 1987). Leave may be denied when the amendment would cause undue prejudice to the opposing party when the movant has “unduly and inexplicably delayed” in requesting leave, when the movant acts on a “bad faith or dilatory motive,” or when the amendment would be futile. Foman v. Davis, 371 U.S. 178, 182 (1962). In exercising its discretion, the court must be mindful that the Federal Rules of Civil Procedure are designed to facilitate decisions on the merits rather than on pleading technicalities. Koch v. Koch. Indus., 127 F.R.D. 206, 209 (D. Kan. 1989).

Despite the evident deficiencies in Plaintiffs’ § 1983 claim, the court determines that in the interests of fairness and justice, and the judicial preference to reach a decision on the merits, Plaintiffs should be permitted to amend their complaint to bring a properly pleaded § 1983 action. Accordingly, the court denies Defendants’ motion to dismiss Plaintiffs’ § 1983 claim at this time, and grants Plaintiffs sixty (60) days from the date of this order to file an amended complaint as to this claim.

## 2. ADA and Rehabilitation Act Claims

Defendants next make three arguments in support of dismissing Plaintiffs’ ADA and Rehabilitation Act claims in Count II of the complaint.

First, Defendants argue that Plaintiffs lack standing to bring claims for damages under the ADA and Rehabilitation Act because they do not bring the claims as representatives of Tomi’s estate, but only allege that they suffered damages due to violations of Tomi’s rights. The court agrees. Plaintiffs improperly brought this action in their individual capacity as heirs-at-law. The

court, however, again concludes that Plaintiffs should be granted sixty (60) days from the date of this order to file an amended complaint as to this claim.

Second, Defendants assert that Plaintiffs lack standing to request injunctive relief on behalf of the mentally disabled and their families in Wyandotte County, Kansas. In support of their position, Defendants cite Tyler v. Kansas Lottery, 14 F. Supp. 2d 1220 (D. Kan. 1998). In Tyler, the plaintiff sought injunctive relief under the ADA in order “to suspend the sale of Lottery tickets or refrain from licensing the sale of Lottery tickets at all retail locations in Kansas which are not accessible to disabled persons.” Id. at 1221. In holding that the plaintiff lacked standing to request injunctive relief, Judge Richard D. Rogers observed:

Plaintiff is not bringing this case as a class action. Although he unquestionably hopes that this action will aid other disabled persons, he is asking for relief as an individual. However, under the holding in City of Los Angeles v. Lyons, 461 U.S. 95, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983), plaintiff cannot obtain standing to sue for injunctive relief merely by alleging that defendant has a policy and practice of discriminating against disabled people in general; plaintiff must demonstrate that he himself faces a real and immediate threat of future harm, not a conjectural or hypothetical threat.

The court concludes that Plaintiffs’ claim for injunctive relief under the ADA and Rehabilitation Act should be dismissed because they do not have standing. Furthermore, the court determines that substituting an appointed representative to Tomi’s estate as the proper party would be unavailing. As noted in Tyler, even though Plaintiffs bring this action “on behalf of others similarly situated to” Tomi, they ask for relief as individuals, not as representatives of a class action. As a result of Tomi’s death, injunctive relief is precluded because the threat of future injury is speculative (and moot) under standing analysis. Accordingly, all claims for injunctive



relief under the ADA and Rehabilitation Act are dismissed.

Finally, Defendants Hoang and Miller maintain that they may not be held individually liable under either of the Acts. Plaintiffs concede that Defendants Hoang and Miller may be sued only in their official capacities, not in their individual capacities. See Butler v. City of Prairie Village, Kan., 172 F.3d 736, 744 (10th Cir. 1999) (“[T]he ADA precludes personal capacity suits against individuals who do not otherwise qualify as employers under the statutory definition.”). In addition, the court concludes that it is not necessary for Defendants Hoang and Miller to be named as individual defendants in their official capacities because that simply operates as a suit against their employer, Unified Government, who is already a named defendant in this case. See Kayhill v. Unified Gov’t of Wyandotte County/Kan. City, Kan., No. 99-2287-KHV, 2000 WL 1146134, at \*1 (D. Kan. July 31, 2000). Accordingly, Plaintiffs’ ADA and Rehabilitation Act claims are dismissed against Defendants Hoang and Miller in both their individual and official capacities.

### 3. KAAD Claims

Defendants next argue that Plaintiffs’ KAAD claims must be dismissed because they lack standing to bring claims under the KAAD, they have not exhausted their administrative remedies, the KAAD is not applicable to law enforcement activities, and Defendants Hoang and Miller may not be held individually liable under the KAAD.

For the reasons stated previously, the court agrees that Plaintiffs lack standing to bring their KAAD claim. The court further determines that amendment to Plaintiffs’ complaint would be futile because they have failed to exhaust their administrative remedies. In their brief, Plaintiffs concede that they have not filed charges with the Kansas Human Rights Commission (“KHRC”). Plaintiffs

argue, without citing to any authority, that because the alleged discrimination resulted in the death of Tomi, that an investigation by the KHRC would not be meaningful. The court disagrees. A plaintiff must exhaust her administrative remedies prior to filing suit under the KAAD. See Aramburu v. Boeing Co., 112 F.3d 1398, 1409 (10th Cir. 1997); Gaddy v. Four B Corp., 953 F. Supp. 331, 334-35 (D. Kan. 1997). Because Plaintiffs have failed to satisfy the exhaustion requirement, the court dismisses Plaintiffs' KAAD claim. It is therefore unnecessary to address Defendants' remaining arguments.

#### 4. Claim Under the Care and Treatment Act For Mentally Ill Persons

Finally, Defendants argue that Plaintiffs' claim pursuant to Kansas's Care and Treatment Act for Mentally Ill Persons ("Care and Treatment Act") fails because they lack standing to bring the claim, the Care and Treatment Act does not provide a private cause of action for damages, and even if it does, Plaintiffs' allegations do not state a claim under the Act.

Again, the court agrees with Defendants that Plaintiffs lack standing to bring a claim for an alleged violation of Tomi's rights under the Care and Treatment Act. The court, however, will address Defendants' argument that the Care and Treatment Act does not provide a private right of action for damages to determine whether amendment to Plaintiffs' complaint would be futile.

The present issue is one of first impression. "Whether a private right of action exists under a statute is a question of law." Nora H. Ringler Revocable Family Trust v. Meyer Land & Cattle Co., Inc., 958 P.2d 1162, 1165 (Kan. Ct. App. 1998) (citation omitted). Kansas invokes a two-part test to determine whether a private cause of action is created under a state statute. Id. A party must first demonstrate "that the statute was designed to protect a specific group of people rather than to

protect the general public.” Id. (citation omitted). The court must then review the statute’s legislative history to decide whether the Kansas Legislature intended to establish a private right of action. Id. Kansas courts have observed that this analysis is similar to the test that the United States Supreme Court employs when assessing whether a private cause of action exists under federal statutes. Id. (citation omitted).

Initially, the court observes that neither party has analyzed whether the Care and Treatment Act creates a private right of action under Kansas’s two-part test. After conducting its own review of the legislative history of the Care and Treatment Act, the court concludes that the Kansas Legislature did not intend to create a private cause of action for damages when it enacted the statute.<sup>5</sup>

The Kansas Legislature passed the Care and Treatment Act for Mentally Ill Persons in 1996, repealing The Treatment Act for Mentally Ill Persons, K.S.A. § 59-2901et seq. In brief, the Act includes provisions for: (1) protecting the rights of individuals subject to the Care and Treatment Act; (2) determining whether a person is a mentally ill person subject to involuntary commitment; (3) admitting and discharging voluntary patients from treatment facilities; (4) authorizing law enforcement officers to take a person suspected of being mentally ill into custody without a warrant; (5) administering medical treatment to individuals subject to the Care and Treatment Act; (6) ordering outpatient treatment; (7) reviewing the status of individuals committed to a treatment

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<sup>5</sup> Because of this determination, the court finds it unnecessary to discuss the first element of the two-part test, whether the Care and Treatment Act was designed to protect a specific group or the general public.

facility; and (8) disclosing a patient's medical records.

The Care and Treatment Act does not contain any express provisions granting a private cause of action for damages, nor does the statute's language or legislative history provide any indication that the Kansas Legislature desired to provide a private remedy for damages. In response to Defendants' motion to dismiss, however, Plaintiffs direct the court's attention to one particular section of the Care and Treatment Act, entitled "Civil and Criminal Liability," which provides:

Any person acting in good faith and without negligence shall be free from all liability, civil or criminal, which might arise out of acting pursuant to this act. Any person who for a corrupt consideration or advantage, or through malice, shall make or join in making of any false petition, report or order provided for in this act shall be guilty of a class A misdemeanor.

K.S.A. § 59-2980.

The crux of Plaintiffs' argument is that a private right of action can be reasonably inferred from this section because of the section's reference to civil liability. The court disagrees. At most, this language appears to provide a defense to civil or criminal liability that might otherwise result from acting under the Care and Treatment Act, i.e., it provides a defense to existing common law or statutory causes of action. Section 59-2980's reference to civil liability does not compel the conclusion that a statutory tort was created by the Care and Treatment Act. Moreover, the court notes that the Kansas Legislature provided only criminal penalties under the statute. See K.S.A. § 59-2978 (stating that a willful violation of this section is a class C misdemeanor); K.S.A. § 59-2979 (same); K.S.A. § 59-2980 (stating that a person who maliciously files a false report under the act shall be guilty of a class A misdemeanor). If the Kansas Legislature desires to create a private cause of action for damages under the Care and Treatment Act, it knows how to do so. The court

is reluctant to imply a cause of action without evidence of the legislature's intent. Accordingly, the court grants Defendants' motion to dismiss Plaintiffs' Care and Treatment Act claim.

IT IS, THEREFORE, BY THE COURT ORDERED that Defendants' motion to dismiss is granted in part and denied in part. Specifically, the court grants Defendants' motion as to Plaintiffs' claims under the Kansas Act Against Discrimination and the Care and Treatment Act for Mentally Ill Persons. The court further grants Plaintiffs sixty (60) days from the date of this order to amend their complaint as to their claims under § 1983 and the Americans With Disabilities Act and Rehabilitation Act. Finally, under Plaintiffs' Americans With Disabilities Act and Rehabilitation Act claims, the court dismisses Defendants Hoang and Miller, and Plaintiffs' request for injunctive relief.

Copies of this order shall be transmitted to counsel of record.

**IT IS SO ORDERED.**

Dated at Kansas City, Kansas, this 13th day of May 2004.

/s/ G.T. VanBebber  
G. Thomas VanBebber  
United States Senior District Judge

